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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTOINE HENDERSON,

Defendant and Appellant.

D073983

(Super. Ct. No. SCN365577)

APPEAL from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antoine Henderson appeals the denial of his motion to withdraw his guilty plea on the ground that he was not advised of a possible future commitment as a sexually violent predator (SVP)<sup>1</sup> as a result of his plea. As discussed *post*, possible future SVP commitment is a collateral consequence of a plea, and therefore the trial court had no duty to advise defendant of that possibility. Defense counsel's duties to his client, however, are broader than the trial court's duty and may include the duty to advise of collateral consequences that can severely restrict a defendant's liberty and that are closely connected to the criminal process, such as the possibility of an SVP commitment.

Defendant has shown no prejudice, however, because he failed to state that he would have rejected the plea agreement and gone to trial if he had been advised of the SVP commitment possibility. We therefore affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant pleaded guilty to assault by means of force likely to produce great bodily injury and forcible sexual penetration. He stipulated to the preliminary hearing as the factual basis for the plea and agreed to permit the use of the facts underlying dismissed charges for sentencing purposes.

Andrew M. owed defendant about \$1,000 for drugs he had purchased. Defendant kidnapped Andrew at knifepoint and took him to a hotel room where he held him

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<sup>1</sup> The Sexually Violent Predators Act (SVPA) provides for involuntary civil commitment of SVPs to a state hospital. (Welf. & Inst. Code, § 6600 et seq.)

overnight in a closet, sodomized him approximately four to five times with a dildo, and forced him to orally copulate the defendant. Defendant pistol-whipped Andrew during the encounter. The pistol was within defendant's grabbing range during the sexual assaults. Defendant assaulted Andrew as punishment for taking his drugs and not paying for them.

Defendant was charged with seven counts: kidnapping to commit oral copulation or sodomy (Pen. Code,<sup>2</sup> § 209, subd. (b)(1), count 1), with personal use of a deadly weapon (§ 12022, subd. (b)(1)) and personal use of a firearm (§ 12022.53, subd. (b)); kidnapping (§ 207, subd. (a), count 2), with personal use of a deadly weapon (§ 12022, subd. (b)(1)) and personal use of a firearm (§ 12022.53, subd. (b)); assault with a deadly weapon (§ 245, subd. (a)(1), count 3); false imprisonment by violence or fraud (§§ 236, 237, subd. (a), count 4); sexual penetration by use of force (§ 289, subd. (a), count 5), with multiple allegations increasing the possible punishment up to 25 years to life (§ 667.61, subds. (a)-(e)); forcible oral copulation (§ 288a, subd. (c)(2)(A), count 6), with personal use of a firearm (§ 12022.53, subd. (b)), and with multiple allegations increasing the possible punishment up to 25 years to life (§ 667.61, subds. (a)-(e)); and carrying a concealed firearm (§ 25400, subd. (a)(2), count 7) with a prior felony conviction (§ 25400, subd. (c)(1)). It was also alleged that defendant had four prison priors (§ 667.5, subd. (b)), one of which was also a strike prior (§§ 667, subds. (b)-(i), 1170.12).

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<sup>2</sup> Further references are to the Penal Code unless otherwise specified.

On December 6, 2017, defendant pleaded guilty to assault with force likely to cause great bodily injury (§ 245, subd. (a)(4), count 3) and sexual penetration by use of force (§ 289, subd. (a), count 5), pursuant to a plea agreement. Defendant also admitted one prison prior (§ 667.5, subd. (b)) and one strike prior (§§ 667, subds. (b)-(i), 1170.12). In return, the People agreed to dismiss all the other charges and allegations and to stipulate to a determinate term of 15 years.

Defendant initialed and signed a plea form, stating under penalty of perjury that he was pleading guilty to the specified offenses and admitting the specified prior convictions. He noted that his attorney had explained to him his rights, the sentence, and other consequences of the plea, including lifetime registration as a sex offender.

The trial court examined defendant under oath to ensure the plea was knowing and voluntary. The court confirmed that before signing the plea form defendant had the opportunity to speak with his attorney about the meaning and consequences of his plea of guilty and what each of the paragraphs meant. The trial court explained the various consequences of the guilty plea. Defendant acknowledged that he understood these matters, that he had no questions, and that it was still his intent to enter the guilty plea. The trial court accepted defendant's plea and set the matter for sentencing.

On April 24, 2018, defendant filed a motion to withdraw his guilty plea pursuant to section 1018 claiming inter alia that he was not informed of the potential civil commitment as an SVP as a consequence of his plea. At a hearing on the motion on May 3, defendant testified that his defense counsel did not explain the possible consequences due to the SVPA. Counsel did not tell defendant that he would be screened

for SVP classification at the conclusion of his prison term and could be committed to a state hospital indefinitely if found to be an SVP. Defendant never said that he would have rejected the plea and gone to trial if he had been informed of the possibility of the commitment.

Defense counsel admitted that he did not advise defendant of the possible SVP commitment because he did not identify it as a potential consequence. In defense counsel's opinion, the offer of a determinate term of 15 years was a very good deal and beneficial to defendant, even with defendant pleading guilty to a sex offense with the possibility of an SVP commitment. Defendant was likely to end up with a life sentence if he went to trial.

The trial court accepted as credible the testimony of defendant and of defense counsel that counsel did not advise defendant of the possibility of an SVP commitment at the conclusion of his prison term. The court found no deficient performance in this failure, however, because case law, *People v. Moore* (1998) 69 Cal.App.4th 626, 630–631 (*Moore*), held that an SVP commitment was a collateral consequence and there was no obligation to inform a defendant of this possibility before entry of plea.

The trial court also found that even if error occurred, there was no reasonable probability that defendant would have rejected the plea offer and gone to trial. Defendant faced a sentence of three consecutive life terms with a minimum of 70 years to life in prison. Defendant was "entirely motivated by the plea of guilty with a stipulated 15-year determinate sentence to avoid the likelihood of, if convicted, that he would spend the rest of his life in prison." The court denied the motion for withdrawal of plea.

The court imposed the sentence as specified in the plea agreement, a determinate term of 15 years in state prison. Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

## DISCUSSION

Defendant argues that the trial court improperly denied his motion to withdraw his guilty plea because defendant did not enter it knowingly and intelligently, as he was not advised of potential commitment under the SVPA before he entered his plea. Defendant also argues ineffective assistance of counsel because counsel failed to inform him of the possibility of SVP commitment.

### *Withdrawal of Plea*

Upon a showing of good cause, the court may allow a defendant to withdraw a plea of guilty at any time before judgment. (§ 1018.) To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. (*Ibid.*; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) The defendant must also show prejudice in that he would not have accepted the plea bargain had it not been for the error. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416 (*Breslin*).) On appeal, we affirm the trial court's ruling on a motion to withdraw the plea unless the defendant shows a clear abuse of the trial court's discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) In evaluating challenges to the court's ruling, we "must adopt the trial court's factual findings if substantial evidence supports them." (*Ibid.*; *Breslin*, at p. 1416.) We are bound by the trial court's credibility determinations. (See *Fairbank*, at p. 1254.)

### *Ineffective Assistance of Counsel*

Defendant also claims that his defense counsel was constitutionally ineffective in failing to advise him of the potential future commitment. Defendant has the burden of showing that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*).) In the context of a guilty plea, the defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59; *Lee v. United States* (2017) \_\_ U.S. \_\_ [137 S.Ct. 1958, 1965]; *Breslin, supra*, 205 Cal.App.4th at p. 1419.)

### *Direct and Collateral Consequences*

Here, we note the trial court had no duty to advise defendant of possible future SVP commitment because it was a collateral consequence and not a direct consequence. (See *Harris v. Superior Court* (2017) 14 Cal.App.5th 142, 149–150 (*Harris*); *People v. Gurule* (2002) 28 Cal.4th 557, 634 (*Gurule*).) A judicially declared rule of state criminal procedure requires that the trial court advise a defendant of all the direct consequences of a guilty plea but not the collateral consequences. (*Harris*, at pp. 149–150; *Gurule*, at p. 634.) A consequence of a plea is considered direct if it is penal in nature and has " ' ' 'a definite, immediate, and largely automatically effect on the range of the defendant's punishment.' " ' ' ' (*Moore, supra*, 69 Cal.App.4th at p. 630; *Harris*, at p. 149.) A collateral consequence, on the other hand, " 'does not "inexorably follow" from a conviction of the offense involved in the plea.' " (*Harris*, at p. 150.) An SVP

commitment does not inexorably follow from a conviction for a sexually violent offense. To commit defendant, the People would have to prove beyond a reasonable doubt that defendant had a diagnosed mental disorder that made it likely he would engage in future predatory acts of sexually violent criminal behavior, in addition to his conviction for forcible sexual penetration, which is a qualifying sexually violent offense. (Welf. & Inst. Code, § 6600, subd. (a)(1); *People v. Yates* (2018) 25 Cal.App.5th 474, 477.) Thus, possible future commitment is a collateral consequence of a plea, and the trial court had no duty to advise defendant of that possibility. (*Moore, supra*, 69 Cal.App.4th at pp. 630–631.)

An attorney's duties under the Sixth Amendment may be broader than a court's duty to advise a defendant of the consequences of a plea. For claims of ineffective assistance of counsel, the United States Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*, [*supra*,] 466 U.S., at [p.] 689." (*Padilla v. Kentucky* (2010) 559 U.S. 356, 365 (*Padilla*).) The *Padilla* case involved advisement of immigration consequences, which, although a civil proceeding, is a "particularly severe 'penalty' " that is "enmeshed with criminal convictions." (*Id.* at pp. 365–366.) The court held that when adverse immigration consequences were possible but not certain, a criminal defense attorney had a duty to advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. (*Id.* at p. 369.) The possibility of an SVP commitment, like deportation, is a severe penalty that is enmeshed with criminal convictions. Indeed, *Moore* compared



SVPA proceedings to deportation. (*Moore, supra*, 69 Cal.App.4th at p. 633.) Thus, defense counsel may have a duty to advise a defendant entering a plea to a sexually violent crime that an SVP commitment is a possible result of a conviction. (See *Padilla*, at p. 369.)

We need not decide if defendant must be advised of a possible future SVP commitment. Here, defendant has not proved prejudice for either ineffective assistance of counsel or for withdrawal of his plea. Both claims require a defendant to show a reasonable probability that he would have rejected the plea and insisted on trial if he had been advised of an SVP commitment possibility. (*Breslin, supra*, 205 Cal.App.4th at pp. 1416 [motion to withdraw plea], 1419 [ineffective assistance of counsel].) Defendant never stated in either his declaration in support of his motion, or in his testimony at the motion hearing that he would have rejected the plea if he had been advised of the commitment possibility. The trial court found no reasonable probability that defendant would have rejected the plea offer and gone to trial, in light of the likelihood of receiving a term of 70 years to life in prison. There was no prejudice under either theory.

Even on appeal, defendant asks that we not strike the plea, but that we send the matter back to the trial court for him to consult with his attorney and to seek a modification of the probation report and of his guilty plea. We do not permit defendants "to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295.) We deny defendant's request to remand this case.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.